In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-359

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent unions do not deny that the question presented in the Board's petition—*i.e.*, whether a union seeks to compel an employer to engage in bargaining beyond the scope of established bargaining units, in violation of Section 8(b)(3) of the National Labor Relations Act, where, although it engages in separate negotiations for each unit, it refuses to exe-

cute an agreement in one unit until the same general terms are made available to the other units as well —is an important one, which warrants resolution by this Court. They argue solely that the "court below expressly refused to reach or decide that issue, declaring that it was not the basis for the Board's decision and constituted merely a *post hoc* attempt by Board counsel to rationalize a Board decision actually predicated upon a different ground" (Br. in Opp. 6). They contend that the basis of the Board's decision was that "the unions in Western Operations had insisted that the Company bargain with them about non-Western units," and the court below merely "held this finding to be without evidentiary support" (*ibid.*).

The Board's "refusal-to-bargain" finding, however, was not predicated on the theory that the unions insisted to impasse on a companywide master agreement, or on negotiating about the benefits for the other units in the Western Operations bargaining sessions. Rather, the Board's theory was that, while the unions went through the form of bargaining for separate contracts in each unit, their action in insisting upon simultaneous and satisfactory settlement of contracts for all units in order to obtain uniform benefits, had the practical effect of compelling companywide bargaining.

We believe that the specific language of the Board's finding supports this interpretation, and rebuts the contention that the Board concluded there was an effort to conclude a single master agreement, or to

negotiate in one unit about benefits for other units. Thus, the Board found that "one of the [union's] primary objectives throughout the course of bargaining at the [company's] Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and * * * by insisting in furtherance of the aforesaid objective, as a condition of settlement of negotiations covering the [company's] operations in its Western Division, on simultaneous and satisfactory settlements of contracts in other bargaining units, and by striking in support of such demands, [the unions] have unlawfully attempted to engage in companywide bargaining" (Br. in Op. 5).[1]

Accordingly, contrary to the conclusion of the court below, the question whether the unions violated Section 8(b)(3) of the Act by maintaining, in their separate negotiations, positions which had the practical effect of compelling the Company to bargain beyond established unit lines, is directly presented by the Board's decision here, and is not merely "counsel's *post hoc* rationalizations for agency action" (Pet. in No. 72-220, A-5). Moreover, since the basic

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[1] Footnotes three and seven to that finding further summarize the behavior of the unions which the Board concluded amounted to an attempt to engage in companywide bargaining. Significantly, there is no mention of an attempt to conclude a single master agreement, nor of an attempt to negotiate in one unit about the benefits for other units (Pet. in No. 72-220, A 17-19).

facts are undisputed,[2] and it is important both to the administration of the Act and to the conduct of labor-management relations that this legal issue be promptly resolved (Pet. in No. 72-359, 12-13), this Court should now do so.

Respectfully submitted.

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Solicitor General.

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NOVEMBER 1972.

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[2] The unions' contention (Br. in Opp. 4, n. 3) that there is a dispute as to whether they "insist[ed] that the terms negotiated in one unit be extended to the other units" rests on the misreading of the Board's decision discussed above. Thus, the unions contended in the court below, and the court below agreed, that the evidence did not support a finding that they insisted upon bargaining about benefits for the other units in the course of the negotiations for the Western Operations. As shown above, however, the Board did not so find, but merely that, while the unions engaged in separate negotiations for each unit, they insisted, as a condition of the settlement of negotiations in one unit, on simultaneous settlement of contracts in other units in order to obtain uniformity in benefits. There is no dispute as to the latter facts; the only issue is whether they justify the Board's legal conclusion that the practical effect of the unions' conduct was the same as if they had overtly compelled the Company to bargain beyond established unit lines.

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